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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. ~~1901~~ 70-354

JACK FOODEN, ON BEHALF OF THE MEMBERS OF COOK COUNTY COLLEGE TEACHERS UNION, LOCAL 1600, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, A VOLUNTARY ASSOCIATION, AND BENJAMIN SOLOMON, AND IDA LALOR,

Petitioners,

vs.

BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES OF ILLINOIS, A BODY CORPORATE AND POLITIC,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

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IN THE

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OCTOBER TERM, 1970.

No. .....

JACK FOODEN, ON BEHALF OF THE MEMBERS OF COOK COUNTY COLLEGE TEACHERS UNION, LOCAL 1600, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, A VOLUNTARY ASSOCIATION, AND BENJAMIN SOLOMON, AND IDA LALOR,

Petitioners,

vs.

BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES OF ILLINOIS, A BODY CORPORATE AND POLITIC,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

Petitioners Jack Fooden, on behalf of the members of Cook County College Teachers Union, Local 1600, American Federation of Teachers, AFL-CIO and Benjamin Solomon and Ida Lalor, hereby respectfully pray that a writ of certiorari issue to review the decision of the Supreme Court of Illinois entered in this proceeding, as modified on March 31, 1971, with request for reconsideration also denied on March 31, 1971, and thereby affirming the judgment entered by the trial court, the Circuit Court for Sangamon County, Illinois, entered on May 12, 1969.

OPINION BELOW.

The Opinion of the Supreme Court of Illinois is not as yet reported. The docket numbers for the case are 42460 and 42461, consolidated.

JURISDICTION.

The decision of the Supreme Court of Illinois denying Petitioners' request for reconsideration was entered on March 31, 1971. This Court's jurisdiction is invoked under 28 U. S. C. § 1257(3).

QUESTIONS PRESENTED.

1. Whether the Fourteenth Amendment to the Constitution of the United States guarantees of due process and equal protection of the laws applies to public employees so as to assure that such employees cannot be terminated from their employment before they are afforded a specific statement of reasons for their termination by the employing authority and a reasonable opportunity to be heard in response thereto by the employing authority.

2. Whether the First and Fourteenth Amendments to the Constitution of the United States guarantees of free speech and assembly and due process apply to non-tenured professors of a public institution of higher learning so as to assure that such teachers, upon their request, cannot be refused renewal of their employment contracts before they are afforded a specific statement of reasons for their termination by the employing authority and a reasonable opportunity to be heard in response thereto in the form of an impartial hearing established by the employing authority when such teachers have been (a) recommended

for contract renewal by recognized reviewing bodies of the faculty; and (b) prior to the employing agency's unexplained decision to override the faculty's recommendations for contract renewal, the subject teachers asserted leadership among the faculty in the exercise of First Amendment rights of free association and speech on matters of public concern and of general interest to the faculty.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED.

The constitutional and statutory provisions applicable to this case are set forth as follows:

The United States Constitution, Amendment I, provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The United States Constitution, Amendment XIV, provides, in pertinent part, as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

The statutory authority of the Respondent public body is set forth in Chapter 144, Illinois Revised Statutes, §§ 1001-1009 and §§ 1101-1103. Specifically, the authority of Respondent Board of Governors of State Colleges and Universities is set forth in Chapter 144 Illinois Revised

Statutes, § 1008, which provides, in pertinent part, as follows:

> 3. employ, and, for good cause, to remove a president of each college or university and all necessary professors, associate professors, assistant professors, teachers, instructors, and other educational assistants, and all other necessary employees, to prescribe their duties and, within the limitations imposed by law for the University Civil Service System and the State Universities Retirement System, contract with them upon matters relating to tenure, salaries and retirement benefits;

STATEMENT OF CASE.

The subject case was initially filed as two companion complaints and were subsequently consolidated by the Supreme Court of Illinois because of common issues of law and fact and because of substantially the same parties in interest.

The Cook County College Teachers Union, Local 1600, American Federation of Teachers, AFL-CIO (hereinafter referred to as the "Union"), is a voluntary association of college faculty. The Union is a plaintiff in both suits and is represented, as a class, by Jack Fooden, a professor and executive of the Union. Plaintiffs Ida Lalor and Benjamin Solomon are individual plaintiffs in each suit, respectively. Plaintiffs Lalor and Solomon had been non-tenured professors at Chicago State College and leaders of the Union. The defendant in both cases is Board of Governors of State Colleges and Universities of Illinois (hereinafter referred to as the "Board"), a public body of the State of Illinois and the governing board of Chicago State College, a public institution of higher learning.

The complaints in both cases were filed on April 7, 1969 and allege that the individual plaintiffs were unlawfully

being removed from the faculty of Chicago State College, effective at the close of the current academic year in the spring of 1969. The basis of the complaints were twofold:

1) The procedures followed by the administration of the College for effecting the removal of the professors from the faculty were unlawful in that, although both professors were recommended for contract renewal by the established appropriate faculty committees, the administration refused to honor the recommendation, while refusing the professors' and the Union's request for a specific statement of reasons for the administration's decision and an opportunity for the professors to be heard and present contradictory evidence and reasons in response thereto. The complaints specifically relied upon the due process guarantees of the Fourteenth Amendment.

2) The plaintiffs further alleged that upon information and belief the professors were in fact being terminated from their employment because of their leadership in the Union and its recent abortive efforts to seek a faculty election on union recognition and collective bargaining. The administration had refused to participate in such an election or recognize its results if conducted. The plaintiffs also alleged that they believed that their termination was also a direct result of their recent efforts, through recognized administration and faculty bodies, to open discussion and analysis on the problems of racism in public education because of the special role of Chicago State College as principally an aducational center for the development and training of teachers in the public school system in the Chicago area. The complaints also alleged that termination of the professors for the above mentioned reasons would be violative of their constitutional rights to free speech and assembly, as applied to the exercise of authority by public bodies through the Fourteenth Amendment.

The Union's and professors' contention that they were being terminafed because they had exercised their rights to free speech and assembly in a legitimate manner is inseparable from the allegation that they were denied due process. The College administration's refusal to confront the professors with the specific reasons for overruling the faculty's recommendations for contract renewal rendered it exceedingly difficult, if not impossible, to demonstrate the lack of professional justification for the administration's actions.

Although the professors had been notified in November, 1968 by the chief executive officers of Chicago State College that they would be terminated at the end of the May-June term in 1969, the Board had failed and refused to act upon the professors' request for review of their dismissal as of the time the complaints were filed on April 7, 1969. Therefore, on April 16, 1969, plaintiffs filed Motions for Emergency Relief seeking the court to restrain, during the pendency of the suit, the removal of the professors for the forthcoming academic term due to the failure of the Board to act for five months and the impracticality for the individual plaintiffs to secure other employees in their professional capacity on such short notice.

After the plaintiffs' Motion for Emergency Relief was filed, the Board acted on April 18, 1969 and formally approved the removal of the professors. Concurrently, the Board filed a Motion For Summary Judgment with the trial court, supported by the Affidavit of the executive officer and secretary of the Board. The Affidavit simply set out the statutory authority of the Board to hire and remove faculty, and the fact that the individual plaintiffs were under non-tenured employment contracts and that on April 18, 1969 the Board had approved the decision of the college administration not to renew the contracts which

had been communicated to the professors in November, 1968. The Affidavit did *not* refute the allegations that the professors had been recommended for reappointment by the established faculty bodies and that the administration and Board had continuously refused to specify the reasons for overruling the recommendations and to afford the professors a hearing in response thereto. The Affidavit was silent on the reasons for removing the professors, and made no effort to deny that the professors had been leaders of the Union and active in initiating open discussion and analysis on the problems of racism in public education.

The trial court set the plaintiffs' and defendant's motions for hearing and entered an order for summary judgment, without opinion, in favor of the defendant on May 12, 1969.

The plaintiffs appealed directly to the Supreme Court of Illinois. Arguments were heard and the Supreme Court of Illinois rendered its initial opinion on January 25, 1971, affirming the judgment of the trial court with Justices Ward and Goldenhersh dissenting. It should be pointed out that from the time of argument until the decision, there had been a change in the composition of the Supreme Court of Illinois, with Justices Davis, Ryan and Goldenhersh replacing three Justices who had heard the oral arguments, but no longer sitting when the decision was rendered.

Petition for rehearing was filed, but refused by the Supreme Court of Illinois on March 31, 1971. However, in refusing rehearing, the majority opinion was modified to eliminate specific references to the constitutional issues raised by the Petitioners in their briefs and Petition For Rehearing. In the first opinion, the majority of the Supreme Court specifically rejected the conclusion that the professors, as public employees, had any rights to due process or free speech and assembly which prevented a public body from refusing to renew their contracts. In

the modified opinion, the majority dropped the specific references to the constitutional issues and merely concluded that non-tenured teachers have no procedural rights other than those specified in state statutes and rules of the Board. The majority of the Supreme Court of Illinois concluded ". . . that the Board's sole duty . . . was to provide the notice of nonretention within the required time."

In both its original and modified opinion, the Court rejected the argument that the professors were entitled to specific statements of reasons for their removal and an impartial hearing because of their belief that they were being dismissed for their union activity and expressions of personal views on public education. Although the defendant Board never refuted the validity of the professors' belief or, for the matter, ever set forth in any pleading the reasons for their removal, the Supreme Court of Illinois held that the plaintiffs' rights were sufficiently protected ". . . through the use of interrogatories and depositions of persons having such information and the production of such papers or documents as may be pertinent." In the first published opinion, the majority of the Court also added that ". . . we would be inclined to find that a Board has a right, summarily, to terminate a probationary teacher's employment at the end of his employment term, and that he has no constitutional right to continued employment." In support of its conclusion, the majority cited *Jones* v. *Hopper,* 410 F. 2d 1323 (C. A. 10), cert. denied 397 U. S. 991 (1970).

We also note that neither the trial court in its order for summary judgment, nor the majority of the Supreme Court of Illinois dealt with the plaintiffs' request for a general declaration of rights and appropriate injunctive relief concerning the Board's policies in relation to the rights of non-tenured faculty.

HOW FEDERAL QUESTIONS WERE PRESENTED.

The complaints filed herein specifically alleged that the procedures followed for effecting the removal of the individual plaintiffs and other non-tenured faculty at Chicago State College was violative of the Fourteenth Amendment to the Constitution of the United States. (Complaints, paragraph 15) The constitutional rights of the plaintiffs to due process was extensively briefed before the Supreme Court of Illinois in the appellants' original brief and reply brief and in the memorandum in support of their Petition For Rehearing. The Petition For Rehearing made specific reference to several federal court decisions supporting the right of due process for public employees, including non-tenured faculty, prior to their removal from employment which had been published after the complaints were filed and the presentation of the initial briefs to the Supreme Court of Illinois. In this regard, we note that *Sindermann* v. *Perry*, 430 F. 2d 939 (C. A. 5, 1970), was specifically referred to in the Petition For Rehearing before the Supreme Court of Illinois. The Supreme Court of the United States has granted a writ of certiorari in the decision of the Fifth Circuit under title *Perry* v. *Sindermann*, ... U. S. ..... 39 LW 3545 (Case No. 952, 1971).

REASONS FOR GRANTING THE WRIT.

While this Petition was being prepared, we noted that the Supreme Court of the United States granted certiorari in *Perry* v. *Sindermann*, certifying the following question, as reported in Law Week:

> "Does teacher without tenure and with no expectancy of having his contract renewed have any constitutionally protected right to continued employment?"

The facts in *Perry* v. *Sindermann* are strikingly similar to the subject litigation. The district court in *Perry* v. *Sindermann* had granted summary judgment in favor of a defendant public employer in not renewing the employment contract of the plaintiff non-tenured professor. The plaintiff had contended that he was removed from the faculty without a specific statement of reasons and an opportunity for an impartial hearing. The plaintiff believed that the motivating reason for his removal was his recent prominent activity in a faculty association which took positions on academic affairs of general public interest which were in variance with the policies of the employing board. The district court granted summary judgment on the basis that the plaintiff, in effect, had no cause of action because there was no constitutional obligation upon the employing board to grant the plaintiff a new contract. The trial court in the subject case and the Supreme Court of Illinois reached the same conclusion, holding that no cause of action exists for non-tenured faculty denied contract renewal. As in *Perry* v *Sindermann*, the decision was rendered in the form of summary judgment.

1. The device of summary judgment should not be sanctioned to avoid meeting constitutional rights of due process. The opinion of the majority of the Supreme Court of Illinois underscores the basic defect to the effective protection of constitutional rights. The court concluded in both its initial and modified opinions that the rights of faculty members, if they do exist, can be adequately protected by the time consuming and expensive exhaustion of pre-trial discovery procedures. *Bane* v. *Spencer*, 393 F. 2d 108 (C. A. 1, 1968); *Rosenberg* v. *Allen*, 258 F. Supp. 511 (S. D. N. Y., 1966); *Gouge* v. *Joint School District No. 1*, 310 F. Supp. 984 (W. D. Wis., 1970).

2. *Perry* v. *Sindermann* and the subject case reflect a growing body of federal and state court decisions passing

upon the issue of whether public employees have a constitutional right to due process prior to their separation from employment which supports the need for a definite resolution of this major constitutional issue and direction by the Supreme Court of the United States in establishing guidelines for the resolution of current disputes and minimizing the growth of such litigation in the future.

The cornerstone of the growing body of decisions concerning the issue whether due process must be afforded public employees is the decision of the Supreme Court of the United States in *Cafeteria and Restaurant Workers* v. *McElroy*, 367 U. S. 886 (1969). In that case, a cook for a private concessionaire, who was under contract with the Department of the Navy, was dismissed from her private employment because she did not receive a security clearance from the Commander of the defense base at which she worked. In a 5-4 decision, the Supreme Court upheld the dismissal without affording the individual an opportunity to confront the evidence against her prior to her dismissal, on the basis that she was a private employee and that the contract between the concessionaire and the government specifically provided for dismissal in the case of no security clearance. The majority opinion of Justice Stewart has been extensively relied upon to support the proposition that *public* employees cannot be fired without resort to preliminary due process proceedings. Citing prior Supreme Court decisions, Justice Stewart, in part, stated:

> "It is argued that this view of Rachel Brawner's interest is inconsistent with our decisions in United Public Workers v. Mitchell, 330 U. S. 75 and Wieman v. Updegraff, 344 U. S. 183. In those two cases an individual's interest in government employment was recognized as entitled to constitutional protection, and it is contended that what the Court said in deciding them would require us to hold that Rachel Brawner

> was entitled to notice and hearing in this case. In United Public Workers the Court observed that '[n]one would deny' that 'Congress may not "enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work."' 330 U. S. at 100. In Wieman the Court held unconstitutional a statute which excluded persons from state employment on solely on the basis of membership in alleged 'Communist-front' or 'subversive' organizations, regardless of their knowledge concerning the activities and purposes of the organizations to which they had belonged. In the course of its decision, the Court said, 'We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.' 344 U. S., at 192."

Since *Cafeteria Workers*, a number of federal and state courts have held that government employees may not be separated from public service without fulfilling the requirements of procedural due process. In the following cases non-tenured faculty members of public educational institutions, both on secondary and higher levels, have been recognized to have the constitutional right to a specific statement of reasons for their firings and an opportunity to respond. The format for responding is varied with the viewpoint of the court as to what is necessary to fulfill procedural due process, from an opportunity to respond by written communication to an impartial hearing with a review of the allegations against the employee and the receipt of countervailing evidence. See in support, *Lucia* v. *Duggan*, 303 F. Supp. 118 (D. C. Mass., 1969); *Gouge* v. *Joint School District No. 1, supra; Drown* v. *Portsmouth School Dist.*, 435 F. 2d 1182 (C. A. 1, 1970); *Orr* v. *Trinter*, 318 F. Supp. 1041 (S. D. Ohio, 1970); *Roth* v. *Board of*

Regents, 310 F. Supp. 972 (W. D. Wis., 1970); *Parducci* v. *Rutland,* 316 F. Supp. 352 (M. D. Ala., 1970).

The above cited decisions, relying in large part on a statement of majority and minority opinions in *Cafeteria Workers* govern requirements of procedural due process for all public employees and are not limited to public teachers.

The Court, in *Olson* v. *University of Minnesota Regents,* 301 F. Supp. 1356 (D. C. Minn., 1969), required a specific statement of reasons and a hearing before a civil service commission before termination. The case involved the dismissal of a custodial employee and in no way related to alleged violations of First Amendment rights.

In *Meredith* v. *Allen County War Memorial Hospital Commission,* 397 F. 2d 33 (C. A. 6, 1968), the United States Court of Appeals for the Sixth Circuit held that a physician employed at a publicly financed hospital had a right to maintain an action under the United States Civil Rights Act of 1871 and the Fourteenth Amendment contesting in part that his discharge was unlawful because he had not been informed of the reasons and an opportunity to respond thereto. To the same effect is the decision of the United States Court of Appeals for the Second Circuit in *Birnbaum* v. *Trussell,* 347 F. 2d 86 (1965).

Note should also be taken of *Fair* v. *Kirk,* 317 F. Supp. 12 (N. D. Fla., 1970), in which the district court held that due process rights of a major public official, the county superintendent of elections, who had been fired by the government was protected because of his right to a hearing before the legislature prior to his final termination. The Florida District Court cited *Cafeteria Workers* for the proposition that due process was required even for this high appointed official.

The *general* proposition applicable to all non-policy making public employees was set forth by the court in

Albaum v. *Carey*, 283 F. Supp. 3 (E. D. N. Y., 1968), in convening a three judge court to review the constitutionality of a state statute which authorized school superintendents to not renew non-tenured teachers' contracts:

> ". . . the federal constitution requires every level of government to afford non-discriminatory and fair treatment, both substantively and procedurally, to all its employees; conditions of governmental employment may not stifle fundamental liberties." 283 F. Supp. 3, at 9-10.

In accord: *St. Laurent* v. *Gousha*, 313 F. Supp. 1033 (E. D. Wis., 1970); *Chalk Appeal*, 441 Pa. 376, 272 A. 2d 457 (1971).

The leading decision cited in opposition to the thesis that public employment is an interest protected by the due process guarantees of the Fourteenth Amendment is *Jones* v. *Hopper*, *supra*.

3. The concept of applying procedural due process has not been limited to public employment since *Cafeteria Workers*. The Supreme Court of the United States has held constitutional due process requires that welfare recipients be given hearings prior to termination of welfare benefits in order to protect against erroneous terminations. *Goldberg* v. *Kelly*, 397 U. S. 254 (1970). See also the prior state court decision relying upon the Fourteenth Amendment in *Camererra* v. *Department of Public Welfare*, 9 Ariz. App. 120, 440 P. 2d 957 (1969).

The Supreme Court of the United States has applied the same rule of law to tenants in federally assisted housing projects, holding that they may not be evicted without prior notice of the reasons and an opportunity to be heard. *Thorpe* v. *Housing Authority City of Durham*, 393 U. S. 268 (1969). To the same effect see *Caulder* v. *Durham Housing Authority*, 433 F. 2d 998 (C. A. 4, 1970); *Escalera* v. *New York Housing Authority*, 425 F. 2d 853 (C. A. 2, 1970); and *Fuller* v. *Urstadt*, ... N. Y. S. ....., ... LW

2627 (N. Y. Ct. App., April 21, 1971), involving tenants in a state assisted private housing project. Due process guarantees have been extended to recipients of government benefits generally, be it tax exemption (*Speiser* v. *Randall*, 357 U. S. 513 (1958)); unemployment compensation (*Sherbert* v. *Verner*, 374 U. S. 398 (1963)); and to a license to practice law (*Spevack* v. *Klein*, 385 U. S. 511 (1967)).

4. The developing body of decisions dealing with the due process rights of public employees coincides with recent decisions of the Supreme Court of the United States and lower federal courts applying the First Amendment protections of free speech and assembly, in prohibiting local public employers, pursuant to the Fourteenth Amendment, from retaliating against its employees for exercising such rights. The Supreme Court has definitely held that public employment cannot be terminated because of the exercise of First Amendment rights. In *Pickering* v. *Board of Education*, 391 U. S. 563 (1968), the Supreme Court reversed an earlier decision of the Supreme Court of Illinois upholding a school board's decision not to renew the contract of a public secondary school teacher because of his open criticism of the administration of the school district by the public board. The *Pickering* decision was followed by two important decisions in the United States Court of Appeals in holding that one of the protected First Amendment rights of public employees was to be protected from dismissal because of their association with a labor organization as an exercise of their right of free association under the First Amendment. See decisions of the Seventh Circuit Court of Appeals in *McLaughlin* v. *Tilendis*, 298 F. 2d 287 (C. A. 7, 1968) and of the Eighth Circuit in *American Federation of State, County and Municipal Employees* v. *Woodward*, 406 F. 2d 137 (C. A. 8, 1969). See also, *Service Employees International Union* v. *County of Butler, Pa.*, 306 F. Supp. 1080 (W. D. Pa. 1969), denying a motion to

dismiss complaint by public county employees that they were being discharged because of their association and activities on behalf of a labor organization in violation of the First and Fourteenth Amendments and the Civil Rights Act of 1871.

CONCLUSION.

The need to resolve the issue of whether public employment is a right to be protected by the due process guarantees of the Fourteenth Amendment, and, if so, how, and under what circumstances these rights will be protected, has been recognized by the Supreme Court of the United States in the granting of certiorari in *Perry* v. *Sindermann*. The Petitioners' rights are similarly affected, both in terms of the professional and academic careers of the individual plaintiffs and in the current and future rights of the non-tenured faculty at this major public institution. We urge the Court to grant our Petition.

Respectfully submitted,

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APPENDIX A.

OPINION
SUPREME COURT
OF ILLINOIS.

UNITED STATES OF AMERICA.

STATE OF ILLINOIS } ss.
SUPREME COURT }

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the eleventh day of January in the year of our Lord, one thousand nine hundred and seventy-one, within and for the State of Illinois.

Present: ROBERT C. UNDERWOOD, *Chief Justice*
JUSTICE WALTER V. SCHAEFER
JUSTICE DANIEL P. WARD
JUSTICE JOSEPH H. GOLDENHERSH
JUSTICE THOMAS E. KLUCZYNSKI
JUSTICE CHARLES H. DAVIS
JUSTICE HOWARD C. RYAN
WILLIAM J. SCOTT, *Attorney General*
ROBERT G. MILEY, *Marshal*
ATTEST: JUSTIN TAFT, *Clerk*

Be It Remembered, that afterwards, to-wit, on the 25th day of January, 1971 the opinion of the Court was filed in said cause and entered of record in the words and figures following, to-wit:

JACK FOODEN, ET AL.,
Appellants,
vs.
No. 42460
42461
Cons.
BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES OF ILLINOIS, ETC.,
Appellee.

Appeal From Circuit Court, Sangamon County.

Docket Nos. 42460, 42461 cons.—Agenda 41—March, 1970.

JACK FOODEN *et al.*, Appellants, *vs.* BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES OF ILLINOIS, Appellee.

MR. JUSTICE KLUCZYNSKI delivered the opinion of the court:

This is a consolidated appeal of two cases which were jointly heard and decided by the circuit court of Sangamon County. The Cook County College Teachers Union, Local 1600, American Federation of Teachers, AFL-CIO (hereafter, the Union) was a plaintiff in both suits and was represented as a class by Jack Fooden, a professor and an executive of the Union. Individual plaintiffs in each suit were Ida Lalor and Benjamin Solomon, who had served as assistant professors at Chicago State College. On April 7, 1969, the plaintiff Union and Lalor and Solomon brought suit against the Board of Governors of State Colleges and Universities of Illinois, (hereafter the Board) requesting the circuit court to declare the rights of the parties and to order the Board to offer Solomon and Lalor employment as assistant professors at Chicago State College for the 1969-1970 academic year. The Board on April 29, 1969, filed a motion, supported by an affidavit of the executive officer and secretary of the Board, requesting summary

judgment. On May 6, 1969, the circuit court allowed the motion and on May 12, 1969, entered an order granting summary judgment in favor of the defendant Board in both suits. The plaintiffs have appealed directly to this court, claiming that substantial constitutional questions are involved.

The record discloses that in July, 1967, the Board appointed the plaintiffs Solomon and Lalor as assistant professors at Chicago State College for a ten-month term for the academic year 1967-1968. They accepted the appointments and signed an agreement which set out that their appointments were on a "Probationary First Year" basis and were subject to the bylaws, governing policies and practices of the Board. In May of 1968, the Board reappointed Solomon and Lalor as assistant professors on a ten-month basis for the 1968-1969 academic year. They accepted the new appointments and signed similar agreements which stated that the appointments were probationary second-year appointments. In November of 1968, Solomon and Lalor were notified by letter by the Dean of the Faculty at Chicago State College that they would not be offered an appointment for the academic year 1969-1970.

The Union and Solomon and Lalor filed a complaint alleging that the Board had unlawfully removed the plaintiffs Lalor and Solomon from the faculty of the Chicago State College. Specifically, the complaint charged that the procedure employed in removing the plaintiff teachers and giving them notification of their removal was in violation of the defendant Board's rules and policies as set forth in its by-laws, governing policies and practices, and in the Chicago State College Faculty Constitution and Board Resolutions; that the procedures employed also violated the terms of the plaintiff teachers' individual contracts; that these teachers were unconstitutionally removed from the

faculty because the true reason for their removal was their open leadership and activities on behalf of the plaintiff Union and because of their initiation and promotion of open discussion among members of the faculty concerning educational policies and programs for minority groups; and, finally, that the failure of the Board and its agents to assign reasons for their removal violated their constitutional rights of due process.

On April 18, 1969, plaintiffs presented a motion for emergency relief, requesting the circuit court for a temporary order, pending the determination of their suit, which would require the defendant Board to offer Lalor and Solomon positions as assistant professors at Chicago State College for the 1969-1970 academic year. In this motion the plaintiffs alleged that because of the Board's delay of some five months in acting on their request for a review of their case it was then practically impossible for Lalor and Solomon to secure other professional employment for the 1969-1970 year. It appears that also on April 18, 1969, the Board did review the procedures followed by the school administration in the determination not to re-employ the plaintiffs Solomon and Lalor for the academic year 1969-1970, and approved such proceedings.

Thereafter, on April 29, 1969, the Board filed its motion for summary judgment, supported by an affidavit of F. H. McKelvey, the executive officer and secretary of the Board. The affidavit recited that the Board is a public corporate body of the State of Illinois created to operate, manage, maintain and control a number of colleges in the State of Illinois, among them, the Chicago State College. It is authorized by statute (Ill. Rev. Stat. 1969, ch. 144, par. 1008) to make rules, regulations, and by-laws for the management of the institutions under is jurisdiction. It is empowered to employ and for good cause remove all academic

and non-academic employees, and is also empowered to contract with them regarding tenure, salary and retirement benefits. The affidavit declared that pursuant to the statute the Board had adopted certain by-laws governing its policies and practices and that under the Board's procedures teachers are appointed either for a probationary term or for a term with tenure. It set forth that a teacher with tenure had a right to re-employment at the expiration of a term of employment and that the teachers without tenure had no such right. Probationary teachers are appointed for probationary periods which should not, except under particular circumstances, exceed in sum, seven years. Tenure is acquired only by approving Board action upon the recommendation of the president of the college. After a teacher has acquired tenure, his services can be terminated only for adequate cause, except in the case of retirement or extraordinary circumstances based on financial exigencies, the affidavit continued. A teacher with only probationary status has no right to re-employment at the expiration of each term of employment, provided that notice is given by the Board by March first, in the first probationary year, and by December first of any subsequent probationary year that he is not to be continued in employment after the expiration of the academic term.

Finally, the affidavit set forth that only the Board's bylaws, governing policies and practices were applicable to questions involving the re-employment of probationary teachers and that the faculty consitution of Chicago State College was not binding upon the Board or its executive officers. Further, the statements of the American Association of University Professors, the American Council on Education and the Association Governing Boards relating to removal and rehiring were never adopted or approved as a policy of the Board but had been referred to only in a preamble to a resolution adopted by the Board.

After argument the circuit court concluded that there was no real issue as to any material fact and entered an order granting summary judgment for the defendant Board.

On this appeal the plaintiffs argue that the circuit court erroneously granted summary judgment for the defendant inasmuch as there were significant and material issues of fact that were unresolved. These include whether the plaintiff teachers were removed because of their union activities and expressions of views on public education. As these factual issues are unresolved and the plaintiff's charges underlying them are uncontradicted, the plaintiffs contend that the circuit court must have erroneously considered that the Board could properly dismiss the plaintiff teachers for the exercise of constitutionally protected rights. Such a conclusion, the plaintiffs submit, is invalid and violative of their rights to due process and equal protection assured by the United States and Illinois constitutions. They also contend that the failure and continued refusal of the Board, a public entity, to declare the reasons for their removal violate their constitutional right to due process. Finally, the plaintiffs assert that the contracts themselves which are involved assured the right to speak out on issues of legitimate academic concern and granted them rights to a statement of specific reasons for their removal and to a detailed review of the administration recommendations by the faculty senate.

It is argued by the defendant Board that the pleadings taken together demonstrate that there was no material issue of fact. The plaintiffs, the Board says, did not file a counter-affidavit and they cannot challenge the sufficiency of the affidavit or competency of the affiant for the first time on appeal. The plaintiffs' allegations that the teachers were improperly removed because of their union activities and expressions of views on public education did not raise a relevant issue of fact because they were made only on in-

formation and belief. Additionally, these were not allegations of fact but rather were but pleaded conclusions, the Board submits. The affidavit clearly established that the sole obligation imposed on the Board under the circumstances was to notify Solomon and Lalor by December 1, 1968, if they were not to be re-employed. There was no contractual obligation on the Board to announce its reasons for not re-employing Lalor and Solomon and therefore their employment could be properly terminated for any reason.

Section 57 of the Civil Practice Act (Ill. Rev. Stat. 1967, ch. 110, par. 57) provides that upon motion for summary judgment the judgment shall be rendered forthwith if the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. We have previously held that summary judgment procedure is an important tool in the admission of justice, that its use in a proper case is to be encouraged and that its benefits inure not only to the litigants, in the saving of time and expenses, but to the community in avoiding congestion of trial calendars and the expenses of unnecessary trials. *Allen* v. *Meyer*, 14 Ill. 2d 284.

The question posed here is whether this is a proper case for the use of summary judgment procedure when tested by the rules governing such use. It may be stated generally that if what is contained in the pleadings and affidavits would have constituted all of the evidence before the court and upon such evidence there would be nothing left to go to a jury, and the court would be required to direct a verdict, then a summary judgment should be entered. (*People ex rel. Sharp* v. *City of Chicago*, 13 Ill. 2d 157; *Shirley* v. *Ellis Drier Co.*, 379 Ill. 105.) More specifically, it has been held that an affidavit in support of a motion for summary judgment is actually a substitute for testimony

taken in open court and should contain as much pertinent information as the affiant could competently testify to if he were sworn as a witness, (*Welsh* v. *Centa*, 75 Ill. App. 2d 305) and where such well alleged facts are not contradicted by counteraffidavit, they must be taken as true, notwithstanding the existence of contrary averments in the adverse party's pleadings which merely purport to establish *bona fide* issues of fact. (*Renieris* v. *Village of Skokie*, 85 Ill. App. 2d 418; *Murphy* v. *Cory Pump and Supply Co.*, 47 Ill. App. 2d 382.) Also, as against positive, detailed averments of fact in an affidavit, allegations made on information and belief by an adverse party are insufficient, for they are not equivalent to averments of relevant facts but rather put in issue only the pleader's information and belief and not the truth or falsity of the "facts" referred to. (*Whitley* v. *Frazier*, 21 Ill. 2d 292; *Smith* v. *Township High School Dist. 158*, 335 Ill. 346.) And the sufficiency of an affidavit cannot be tested for the first time on appeal where no objection was made either by motion to strike, or otherwise, in the trial court. *Campione* v. *Henry C. Lytton & Co.*, 57 Ill. App. 2d 147.

Under these rules and on the record before us we find that the motion for summary judgment was properly granted by the trial court. The facts set forth in the Board's affidavit clearly established the right of the Board not to retain Solomon and Lalor for another term following the expiration of the probationary term for which they were employed. Plaintiffs' failure to file any responsive pleadings, or any counteraffidavit, in effect constitutes admissions of the facts contained in the Board's affidavit, and plaintiffs' unverified complaint, alleging on information and belief that they were not re-employed because of their union activity and their expressions of personal views on public education, was insufficient to raise a triable issue of fact. To contend that such factual information was not available

to them is irrelevant, for Supreme Court Rule 191(b), (Ill. Rev. Stat. 1969, ch. 110A, par. 191), specifically provides for such exigency through the use of interrogatories and depositions of persons having such information and the production of such papers or documents as may be pertinent. Plaintiffs' objections to the competency of the affiant to testify to the facts stated in the Board's affidavit not only come too late, not having been raised in the trial court, but they do not appear to be well taken, for affiant was the executive officer and secretary of the Board and apparently fully competent to testify on the matters presented.

Finally, plaintiffs contend that the Board had a duty to provide Solomon and Lalor with a specific statement of reasons for nonretention. They argue that the faculty constitution of Chicago State College and the statements of the American Association of University Professors, the American Council on Education and the Association of Governing Boards require that decisions not to reappoint should be supported by compelling reasons stated in detail, and that such requirements form a part of the employment contract. We find that the Board's affidavit clearly refutes this contention and that, as a matter of law, the contract was specifically made subject only to the "By-Laws, Governing Policies and Practices of the Board", and that the Board's sole duty thereunder was to provide the notice of nonretention within the required time. Plaintiff's allegations in their complaint on this matter constitute nothing more than statements of conclusions and do not present a genuine issue of fact in the face of the uncontroverted facts set forth in the Board's affidavit.

In their reply brief plaintiffs argue that to approve the entry of a summary judgment on technical grounds results in the central allegations of their complaint being totally ignored, *i.e.*, that they were removed for union activities and speaking out on general education policies which they

had a constitutional right to do. However, even if the issue were before the court we would be inclined to find that a Board has a right, summarily, to terminate a probationary teacher's employment at the end of his employment term, and that he has no constitutional right to continued employment. In a recent Federal case, *Jones* v. *Hopper* (10th cir. 1969), 410 Fed. 2d 1323, in which *certiorari* was denied by the United States Supreme Court on March 23, 1970, the court considered a complaint by a probationary teacher who contended that his constitutional rights were violated when he was not retained because he had sought to exercise his constitutional rights of speech, publication and religion. The court held that the complaint did not state a cause of action, that the college had a right not to renew his contract, and that a probationary teacher's expectancy of continued employment, after expiration of the term for which he was employed, did not constitute a right, privilege or immunity secured to him by the constitution or by law, and was not an interest protected under the Civil Rights Act. We agree, and find that if a probationary teacher has no constitutional right to continued employment under such circumstances, the Board would have no duty to provide him with specific reasons for his nonretention.

For the reasons stated the judgment of the circuit court of Sangamon County is affirmed.

Judgment affirmed.

WARD and GOLDENHERSH, JJ., dissenting.

APPENDIX B.

employed. Plaintiffs' failure to file any responsive pleadings, or any counteraffidavit, in effect constitutes admissions of the facts contained in the Board's affidavit, and plaintiffs' unverified complaint, alleging on information and belief that they were not re-employed because of their union activity and their expressions of personal views on public education, was insufficient to raise a triable issue of fact. To contend that such factual information was not available to them is irrelevant, for Supreme Court Rule 191(b), (Ill. Rev. Stat. 1969, ch. 110A, par. 191), specifically provides for such exigency through the use of interrogatories and depositions of persons having such information and the production of such papers or documents as may be pertinent. Plaintiffs' objections to the competency of the affiant to testify to the facts stated in the Board's affidavit not only comes too late, not having been raised in the trial court, but they do not appear to be well taken, for affiant was the executive officer and secretary of the Board and apparently fully competent to testify on the matters presented.

Finally, plaintiffs contend that the Board had a duty to provide Solomon and Lalor with a specific statement of reasons for nonretention. They argue that the faculty constitution of Chicago State College and the statements of the American Association of University Professors, the American Council on Education and the Association of Governing Boards require that decisions not to reappoint should be supported by compelling reasons stated in detail, and that such requirements form a part of the employment contract. We find that the Board's affidavit clearly refutes

this contention and that, as a matter of law, the contract was specifically made subject only to the "By-Laws, Governing Policies and Practices of the Board", and that the Board's sole duty thereunder was to provide the notice of nonretention within the required time. Plaintiff's allegations in their complaint on this matter constitute nothing more than statements of conclusions and do not present a genuine issue of fact in the face of the uncontroverted facts set forth in the Board's affidavit.

For the reasons stated the judgment of the circuit court of Sangamon County is affirmed.

Judgment affirmed.

WARD and GOLDENHERSH, JJ., dissenting.

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Supreme Court, U.S.
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E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

70-354

[redacted]

JACK FOODEN, ON BEHALF OF THE MEMBERS OF COOK COUNTY COLLEGE TEACHERS UNION, LOCAL 1600, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, A VOLUNTARY ASSOCIATION, AND BENJAMIN SOLOMON, AND IDA LALOR,

Petitioners,

vs.

BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES OF ILLINOIS, A BODY CORPORATE AND POLITIC,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1901

JACK FOODEN, ON BEHALF OF THE MEMBERS OF COOK COUNTY COLLEGE TEACHERS UNION, LOCAL 1600, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, A VOLUNTARY ASSOCIATION, AND BENJAMIN SOLOMON, AND IDA LALOR,

Petitioners,

vs.

BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES OF ILLINOIS, A BODY CORPORATE AND POLITIC,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent respectfully prays that the Petition For a Writ of Certiorari, filed in this cause, be denied.

OPINION BELOW

As indicated in the petition, the opinion of the Supreme Court of Illinois has not yet been officially reported, but appears in full in Appendices A and B of the petition. For the Court's assistance in considering the petition, Respon-

dent points out that the modification (A 11-12) to the original opinion (A 1-10), made by the Supreme Court of Illinois in considering and denying Petitioners' request for a rehearing, simply had the effect of striking the last paragraph beginning on A 9 and ending on A 10 from the opinion. Therefore, the text of the opinion which is the subject of the petition herein, ends on page A 9.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

It is essential to supplement the provisions cited by Petitioners, by making reference to the Illinois statute on summary judgments and decrees.

Illinois Revised Statutes 1969, Ch. 110, Sec. 57, provides:

> (1) For plaintiff. Any time after the opposite party has appeared or after the time within which he is required to appear has expired, a plaintiff may move with or without supporting affidavits for a summary judgment or decree in his favor for all or any part of the relief sought.
>
> (2) For defendant. A defendant may, at any time, move with or without supporting affidavits for a summary judgment or decree in his favor as to all or any part of the relief sought against him.
>
> (3) Procedure. The opposite party may prior to or at the time of the hearing on the motion file counteraffidavits. The judgment or decree sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment or decree as a matter of law. A summary judg-

ment or decree, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(4) Form of affidavits. The form and contents of and procedure relating to affidavits under this section shall be as provided by rule.

(5) Affidavits made in bad faith. If it appears to the satisfaction of the court at any time that any affidavit presented pursuant to this section is presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing it to pay to the other party the amount of the reasonable expenses which the filing of the affidavit caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

QUESTIONS PRESENTED

The questions presented by Petitioners to this court (Pet. 2-3) do not accurately reflect the issue which they presented to the Illinois Supreme Court. Their exact statement of that issue was as follows:

> "The only issue in this appeal is whether the trial court was warranted in entering summary judgments in favor of the Defendant or whether there are significant and material unresolved or undisputed issues of fact remaining."

The resultant question to the Supreme Court of the United States is whether this case was resolved upon independent and adequate state procedural grounds.

STATEMENT OF CASE

In many respects, Petitioners' statement of the case might be considered acceptable. Its vice, however, is that it states the case they wish they had presented rather than the case actually tried in the Circuit Court and then appealed to the Supreme Court of Illinois. For this reason Respondent feels it essential to restate the case as accurately and briefly as possible.

Respondent Board is a body corporate and politic, which governs certain Illinois institutions of higher education, including Chicago State College. With respect to the College, the Board is authorized by statute to make rules, regulations and by-laws for its good government and management; and to employ, and for good cause, to remove all necessary academic and non-academic employees, contracting with them upon matters relating to tenure, salaries and retirement benefits. Pursuant to statute the Board adopted certain "*By-Laws, Governing Policies and Practices*" with respect to tenure, the appointment of teachers for probationary or tenured terms, and their reappointment. Those policies may be summarized as follows: Teachers are appointed for probationary periods which, in sum, should not exceed seven years and they acquire tenure only by Board action upon recommendation of the president of the college. After acquiring tenure, a teacher's services are terminated only for adequate cause, except in the case of retirement for age or under extraordinary circumstances because of financial exigencies, and he is otherwise entitled to reemployment at the expiration of a term appointment. A probationary teacher, however, has no right to reemployment at the expiration of a term appointment, provided that notice is given by March 1, in the first

probationary year, and by December 1, of any subsequent probationary year, if he is not to be continued in service after the expiration of the year. (A4-5) In May, 1968, the Board appointed Petitioners Solomon and Lalor as Associate Professors of Education at the College on a ten-month basis for the 1968-1969 academic year. Both accepted the appointments and signed agreements stating them to be for "Probationary-2nd Year" status and "subject to the *By-Laws, Governing Policies, and Practices*" of the Board. In November, 1968, Solomon and Lalor were notified by letters from the Dean of the Faculty at the College that their services would not be needed after the 1968-1969 academic year. (A3)

On April 7, 1969, Petitioners filed unverified complaints setting forth, among other things, the foregoing facts and further alleging that the Respondent Board had unlawfully failed and refused to offer Solomon and Lalor continued employment for the 1969-70 academic year and to establish compelling reasons why Solomon and Lalor should not be retained on the College faculty for the 1969-70 academic year. In their unverified complaint the Petitioners alleged "on information and belief" that Respondent's agents, the College President and Dean of the Faculty, had "removed" Solomon and Lalor from the faculty because of (a) their active membership and open support of the Union, and (b) open and determined leadership in initiating and convening campus-wide discussion over the problems of racism as a pervasive force in public education and the special responsibilities concerning such problems to be met by the College. The complaint prayed that the Court declare the rights of the parties and order the Board to offer Solomon and Lalor employment as Assistant Professors at the College for the 1969-70 academic year. (A3-4)

On April 18, 1969, at Petitioners' request, the Board considered the procedures followed with reference to the possible reemployment of Solomon and Lalor, and adopted a motion stating that it had reviewed the procedures, that the procedures were in compliance with Board policies, and that it supported the College President and his staff in their decision concerning the non-reappointment of Solomon and Lalor. On the same date, Petitioners filed their motion for emergency relief seeking an order requiring the Board to offer Solomon and Lalor employment for the 1969-1970 academic year. It was neither verified nor supported by affidavit, but a copy of the complaint was attached and incorporated by reference. (A4)

On April 29, 1969, the Board filed its motion for summary judgment, supported by the affidavit of the Executive Officer and Secretary of the Board. Petitioners filed no responsive pleading and no counteraffidavits. On May 6, 1969, the Court heard arguments of counsel on the Board's motion for summary judgment and allowed the motion, continuing the cause for written order which was entered on May 12, 1969. The Supreme Court of Illinois affirmed that judgment, finding that the matters before the trial court presented no real issue as to any material fact. (A5)

Petitioners now seek relief from the Supreme Court of the United States, arguing constitutional grounds which were not factually before either the trial court or the Illinois Supreme Court.

ARGUMENT

(REASONS FOR DENYING THE WRIT)

Petitioners' prayer for issuance of a Writ of Certiorari should be denied. The opinion of the Supreme Court of Illinois clearly establishes that the issue presented was resolved on independent and adequate state procedural grounds.

In *Henry v. State of Mississippi*, 379 U.S. 443, 446 (1965), Mr. Justice Brennan wrote:

> "It is, of course, a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds, even where these judgments also decide federal questions. The principle applies not only in cases involving state substantive grounds, *Murdock v. City of Memphis*, 20 Wall. 590, 22 L. ed. 429, but also in cases involving state procedural grounds."

The reason for the United States Supreme Court's refusal to review petitions where adequate state grounds exist was stated by Mr. Justice Jackson in *Herb v. Pitcairn*, 324 U.S. 118, 125-126 (1945):

> "The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction.... We are not permitted to render an advisory opinion and if the same judgment would be rendered by the State Court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion."

The test to be applied where a litigant's procedural default might prevent vindication of his alleged federal right is

whether "the state's insistence on compliance with its procedural rule serves a legitimate state interest". *Henry v. State of Mississippi*, 379 U.S. 443, 447 (1965).

The Illinois statute on summary judgments and the procedural rules providing for its implementation, as applied in this case, serve legitimate and important state interests. Mr. Justice Kluczynski of the Illinois Supreme Court delineated those interests within this case (A7) when he said:

> "We have previously held that summary judgment procedure is an important tool in the admission of justice, that its use in a proper case is to be encouraged and that its benefits inure not only to the litigants, in the saving of time and expenses, but to the community in avoiding congestion of trial calendars and the expenses of unnecessary trials. *Allen v. Meyer*, 14 Ill. 2d 284."

The Illinois statute on summary judgments (Ill. Rev. Stat. 1969, Ch. 110, Sec. 57), heretofore set forth verbatim, is substantially the same as Federal Rule of Civil Procedure 56 (Fed. Rules Civ. Proc. Rule 56, 28 U.S.C.A.). It provides that upon motion for summary judgment the judgment shall be rendered forthwith if the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Crucial, therefore, to an understanding of the Illinois Supreme Court's decision is an understanding of the matters that were before the Court upon its consideration of the Respondent Board's Motion For Summary Judgment. Those matters included, for the Petitioners, a complaint which included certain allegations concerning their information and belief as to why they were not to be employed for a further term. The

complaint was not verified. For the Respondent there was a Motion For Summary Judgment supported by a detailed, duly executed affidavit. Petitioners filed no responsive pleading to Respondent's Motion For Summary Judgment, and no counteraffidavit to Respondent's affidavit in support of its motion. Faced with these matters the trial court awarded judgment for the Respondent and the Illinois Supreme Court said (A8):

> "Also, as against positive, detailed averments of fact in an affidavit, allegations made on information and belief by an adverse party are insufficient, for they are not equivalent to averments of relevant facts but rather put in issue only the pleader's information and belief and not the truth or falsity of the 'facts' referred to. *Whitley v. Frazier*, 21 Ill. 2d 292; *Smith v. Township High School Dist. 158*, 335 Ill. 346."

This position is entirely consistent with earlier cases, the Illinois Supreme Court having held in 1893 that allegations on information and belief are not equivalent to allegations of fact. *Lundahl v. Hansen*, 147 Ill. 504, 511 (1893).

Under Federal Rules of Civil Procedure, just as under the Illinois Civil Practice Act, it is clear that, faced with these circumstances and matters, a Federal Court would have granted the Respondent's Motion For Summary Judgment. In *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289 (1968) the court noted that it "is required . . . that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." Petitioners in this case failed to present evidence in any form whatsoever. The United States Court of Appeals for the Fifth Circuit spoke directly to the Petitioners' position in *Piper v. United States*, 392 F. 2d 462, 464 (1969) where it held:

> "An unverified pleading denying the factual statements contained in an affidavit filed in support of summary judgment is not sufficient to controvert the affidavit. *The response is certainly not sufficient to show the existence of a triable issue of fact. Beaufort Concrete Co. v. Atlantic States Constr. Co.*, 352 F. 2d 460 (5 Cir. 1965); *Gauck v. Meleski*, 346 F. 2d 433, 436 (5 Cir. 1965); *Wilkinson v. Powell*, 149 F. 2d 335 (5 Cir. 1945)." (Italics added by Respondent, for emphasis.)

Petitioners rely heavily on this Court's recent action in granting certiorari in the case of *Sinderman v. Perry*, 430 F. 2d 939 (5th Circuit, 1970), Cert. granted, . . . U.S. . . ., 39 LW 3545 (Case No. 952, 1971). The petitioner in *Sinderman* followed proper procedure by filing three affidavits in suport of his pleadings and in addition made a clear offer of facts that would constitute a constitutional claim. An overwhelming distinction exists between *Sinderman* and the Petitioners' position, for unlike *Sinderman* the pleading here was only on information and belief. The Complaint was not verified. No affidavits were filed in support of the Complaint. No interrogatories or depositions were sought or propounded by the Petitioners and no offers of proof were made.

A short review of Illinois Civil Practice and Procedure makes it clear that a summary judgment under these circumstances was not only proper but necessary. As the Illinois Supreme Court indicates (A8-9) the Petitioners had procedural avenues available to them which they failed to utilize. Factual information to support their allegations on information and belief might have been obtained in several ways. "To contend that such factual information was not available to them is irrelevant for Supreme Court Rule 191(b), (Ill. Rev. Stat. 1969, Ch. 110A, Sec. 191), specifically provides for such exigency through

the use of interrogatories and depositions." (See also Fed. Rules Civil Proc. rule 56(f); 6 J. Moore, *Federal Practice,* Para. 56.24, at 2872 (2d Ed. 1953).

CONCLUSION

The Illinois Supreme Court has decided this case in accordance with well established procedural law, patterned substantially after Federal Rules of Civil Procedure. Illinois law has been applied consistently in the manner that it was applied in this case. *Whitley v. Frazier,* 21 Ill. 2d 292 (1961); *Smith v. Township High School Dist. 158,* 335 Ill. 346 (1929); *Lundahl v. Hansen,* 147 Ill. 504 (1893). It is clear that adequate, independent, state grounds exist for the decision in this case and that these grounds are supported by a legitimate state interest. *Allen v. Meyer,* 14 Ill. 2d 284 (1958). For these reasons, the Petition for a Writ Of Certiorari should be denied.

Respectfully submitted,

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